RENDERED: OCTOBER 15, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001971-MR

FLOYD COUNTY BOARD OF EDUCATION; DR. STEPHEN TOWLER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE FLOYD COUNTY BOARD OF EDUCATION; EDDIE PATTON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE FLOYD COUNTY BOARD OF EDUCATION; EDDIE BILLIPS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE FLOYD COUNTY BOARD OF EDUCATION; HATTIE C. OWENS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A MEMBER OF THE FLOYD COUNTY BOARD OF EDUCATION; DR. BRENT CLARK, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE FLOYD COUNTY BOARD OF EDUCATION; AND ROBERT ISAACS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE FLOYD COUNTY BOARD OF EDUCATION — APPELLANTS

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE STEPHEN N. FRAZIER, SPECIAL JUDGE
ACTION NO. 93-CI-00359, NO. 95-CI-00621
NO. 95-CI-00622, AND NO. 95-CI-00623

WAYNE RATLIFF, TOMMY THOMPSON, AND PETE GRIGSBY — APPELLEES

AND

NO. 2002-CA-001968-MR

WAYNE RATLIFF; TOMMY THOMPSON;
PETE GRIGSBY; AND E. MARTIN
MCGUIRE, ATTORNEY-AT-LAW CROSS-APPELLANTS

CROSS-APPEAL FROM FLOYD CIRCUIT COURT
v. HONORABLE STEPHEN N. FRAZIER, SPECIAL JUDGE
ACTION NO. 93-CI-00359, NO. 95-CI-00621
NO. 95-CI-00622, AND NO. 95-CI-00623

FLOYD COUNTY BOARD OF EDUCATION;
DR. STEPHEN TOWLER, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS
SUPERINTENDENT OF THE FLOYD COUNTY
BOARD OF EDUCATION; EDDIE PATTON,
INDIVIDUALLY AND IN HIS OFFICIAL
CAPACITY AS A MEMBER OF THE FLOYD
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BILLIPS, INDIVIDUALLY AND IN HIS
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THE FLOYD COUNTY BOARD OF EDUCATION;
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HER OFFICIAL CAPACITY AS A MEMBER OF
THE FLOYD COUNTY BOARD OF EDUCATION;
DR. BRENT CLARK, INDIVIDUALLY AND IN
HIS OFFICIAL CAPACITY AS A MEMBER OF
THE FLOYD COUNTY BOARD OF EDUCATION;
AND ROBERT ISAACS, INDIVIDUALLY AND
IN HIS OFFICIAL CAPACITY AS A MEMBER
OF THE FLOYD COUNTY BOARD OF EDUCATION CROSS-APPELLEES

OPINION
DISMISSING ON DIRECT APPEAL AND
AFFIRMING IN PART AND REVERSING IN PART
AND REMANDING ON CROSS-APPEAL

** ** ** ** **

BEFORE: GUIDUGLI, MINTON, AND VANMETER, JUDGES.

GUIDUGLI, JUDGE: The Floyd County Board of Education, its superintendent, and its board members in both their individual and official capacities (hereinafter, collectively, "Board of Education") appeal from two orders of the Floyd Circuit Court entered February 12 and August 21, 2002. Specifically, the Board of Education is appealing from the trial court's award of back pay to two former Floyd County School System employees. On cross-appeal, Wayne Ratliff, Tommy Thompson, and Pete Grigsby and E. Martin McGuire are appealing, in part, from the trial court's failure to order injunctive relief, which is at times referred to as a failure to reinstate the restraining order; the amount of damages awarded; the trial court's finding that the Board of Education's violations of the Open Meetings Act were not willful; and the subsequent denial of their motion for attorney fees and costs.[1] Ratliff, Thompson, Grigsby and McGuire have also moved to strike the Board of Education's brief and dismiss the direct appeal because the brief was a virtual copy of a brief tendered by a disqualified counsel. We agree that

[1] The Board of Education originally filed a notice of appeal on March 1, 2002, from the same February 12 and August 21, 2002, orders during the pendency of the plaintiffs' motion to alter, amend or vacate. This Court dismissed that appeal as prematurely taken on May 17, 2002. Following the trial court's ruling on the motion to alter, amend or vacate, the Board of Education filed a notice of appeal through attorney Patricia T. Bausch on September 10, 2002, followed by an amended notice of appeal on September 13, 2002, which were designated as appeal No. 2002-CA-001891. Through attorney Michael J. Schmitt, the Board of Education filed another notice of appeal from the same orders on September 20, 2002, which was designated as appeal No. 2002-CA-001968-MR. A three-judge panel of this Court dismissed appeal No. 2002-CA-001891-MR as a duplicative appeal on April 3, 2003.

the Board of Education's brief must be stricken, and therefore dismiss its direct appeal. On cross-appeal, we affirm on the issues of damages and injunctive relief, but reverse and remand on the finding that the violations were not willful because substantial evidence does not support that finding, as well as on the related issue of attorney fees.

The four circuit court actions presently before this Court have amassed a lengthy procedural history over the course of more than ten years, and a thorough recitation of this history is necessary for a full understanding of the case. In Floyd County Board of Education v. Ratliff,[2] the Supreme Court of Kentucky addressed the first appeal in action No. 93-CI-0359, and we shall therefore set out the Supreme Court's recitation of the facts as follows:

> The Floyd County Board of Education was contemplating reorganization of the central staff of the school board. Ratliff, Thompson and Grigsby, employed as school administrators, stood to lose their positions depending upon which reorganization plan was adopted. The latter part of 1992 and the first half of 1993 was a difficult time for the Board. The Superintendent had been removed by the Kentucky Department of Education; the Board Chairman had resigned after removal charges had been brought by the same body; a board member had resigned because of a stroke and due to similar charges, and a massive investigation by the Kentucky Department of Education had created a voluminous statement

[2] Ky., 955 S.W.2d 921 (1997).

of deficiencies which required corrections by the Board.

On March 25, 27 and 30, and April 3, 1993, the Board held a number of meetings in connection with the reorganization of the central office of the Board. The Board went into "executive" or closed-to-the-public sessions. The minutes of the meetings indicate that the purpose of the secret sessions was to be "personnel" matters. Immediately following the final executive session on April 3, the Board resumed its open meeting and voted unanimously to adopt the proposed central office reorganization plan which eliminated the administrative positions of Ratliff, Thompson and Grigsby. Each of the administrators received a letter dated April 5, 1993, from the superintendent informing them that their administrative positions had been abolished. The three administrators then appealed these actions to the Board by letter dated May 12, 1993, pursuant to KRS 61.846. The letter challenged the validity of using the "personnel" exception to the Open Meetings Act under the circumstances, as well as the power of the Board, under the Kentucky Education Reform Act, to demote or discharge school employees. The Board declined to rescind the reorganization plan or reinstate the former employees. Just before the meeting of April 3, 1993, the administrators circulated copies of a complaint which they indicated they were contemplating filing in the United States District Court. It is now acknowledged that the Board discussed the reorganization plan. A number of lawsuits were later filed challenging the reorganization.

At a hearing before the circuit judge, the Board took the legal position that it closed the meeting in order to discuss pending litigation, that is, the potential suit of the appellees. The Board

> acknowledged that the school board attorney was not present at the secret meetings.
>
> The circuit judge found that there were no material issues of fact, but only questions of law, and there were no evidentiary hearings conducted by the trial court. The trial judge ruled that the Board could go into closed session pursuant to the pending litigation exception and that the administrators were not suffering any irreparable injury. He determined that they had an adequate remedy at law and were not entitled to injunctive relief. The Court of Appeals reversed, holding that the three employees did not need to show that they did not have an adequate remedy at law because the Open Meetings statute specifically contained provisions which allowed them to proceed by injunction. KRS 61.848(1). The Court of Appeals also rejected the claim of a discussion of potential litigation and stated that the Board could not go into closed session in order to engage in a general discussion about personnel matters.[3] This Court accepted discretionary review.[4]

The Supreme Court affirmed this Court's decision, holding that the school board and its members' actions violated Open Meetings laws. As to the "pending litigation" exception, the Supreme Court noted:

> There are no specific Kentucky cases or statutes relating to the scope of the "pending litigation" exception which is found in KRS 61.810(1)(c). We agree with the Court of Appeals that the drafters of this legislation clearly envisioned that this exception would apply to matters

[3] Appeal No. 93-CA-2377-MR.
[4] Id. at 922-23.

> commonly inherent to litigation, such as preparation, strategy or tactics.[5]

In this case, the Supreme Court determined that "the Board went into executive session to consider the reorganization plan and not pending litigation. The discussion expanded the intended scope of the litigation exception and improperly concealed matters otherwise appropriate to the view of the public."[6] Furthermore, the Supreme Court held that injunctive relief was properly requested and "Ratliff, Thompson and Grigsby were not required to demonstrate that they had no adequate remedy at law in their request for an injunction."[7] The Supreme Court concluded by remanding the matter to the circuit court and holding that the Board and its members "violated the Kentucky Open Meetings Act, specifically KRS 61.810(1) on March 30 and April 3, 1993. Accordingly, all such actions taken regarding the central office reorganization are voidable pursuant to KRS 61.848(5)."[8] The Supreme Court's opinion became final on December 11, 1997.

During the pendency of the appeal in this Court and the Supreme Court, Ratliff, Thompson and Grigsby filed complaints in the United States District Court, Eastern District of Kentucky. Their state law claims were dismissed without

[5] Id. at 923-24.
[6] Id. at 924.
[7] Id. at 925.
[8] Id.

prejudice on May 23, 1995, and each filed a similar lawsuit in Floyd Circuit Court in 1995. They alleged that their respective terminations were the result of various violations of state law, including the Open Meetings Act. On June 5, 1997, the circuit court entered a partial summary judgment on liability on behalf of Grigsby. A few months later, Grigsby settled his claim with the Board and an agreed order of dismissal was entered in August. The settlement agreement provided that Grigsby was to receive $111,104.62 in damages "for personal injuries and sickness suffered by Plaintiff."

Once the Supreme Court rendered its decision in the 1993 action, the plaintiffs moved the circuit court to enter an order consistent with that opinion, which the circuit court did by an order entered February 2, 1998. In that order, the circuit court entered a judgment on behalf of the plaintiffs, specifically found that the open meetings act violations were willful, reinstated the plaintiffs to their prior positions, salaries and benefits plus increases, and permanently enjoined the Board of Education from enforcing any action taken at the 1993 meetings. Following entry of this order, the plaintiffs each moved for a summary judgment on the issue of the amount of damages owed to them. The Board of Education apparently filed a motion to alter, amend or vacate this order, although this motion does not appear in the record.

By order entered July 6, 1998, the circuit court determined that a trial would be necessary to decide the type and amount of damages to which each plaintiff was entitled. Additionally, the circuit court stated, "all matters regarding this case since the decision of the Kentucky Supreme Court should be set aside and a trial should be held regarding the issue of damages." The circuit court then denied the pending motions for summary judgment and consolidated the 1993 action with the 1995 actions as they all arose out of the same facts. The trial on damages was eventually held March 22 and 23, 1999. The parties then filed trial briefs with the circuit court. The plaintiffs sought back pay; pay for vacation, sick and personal days; retirement; lost future earnings; and pre-judgment interest. The Board of Education included a sovereign immunity argument, and argued that none of the plaintiffs were entitled to recover any damages.

The circuit court entered a judgment on September 7, 2000, including its findings of fact and conclusions of law. In this judgment, the circuit court found that the Board of Education's violations of the open meetings act were not willful, so that it could not award the limited damages, costs and reasonable attorney fees, and that the plaintiffs' damages claims were limited to the 1995 actions. In determining that

the open meetings act violations were not willful, the circuit court stated:

> The facts surrounding the meetings of March 30th and April 3, 1993, together with the opinion of the Kentucky Supreme Court and the dissenting opinion of Chief Justice Stephens make it clear that the violations of the Kentucky Open Meetings Act which occurred on March 30 and April 3, 1993 were not willful but instead the result of an honest mistake as to the application of the Open Meetings Act to the subject matter under discussion. As a result, the Court finds that there was no willful violation of the Open Meetings Act by the Board of Education on March 30 or April 3, 1993.

As to the individual plaintiffs, the circuit court found that Grigsby settled his 1995 action, so that any further claims he had were barred. Ratliff's and Thompson's 1995 claims were likewise dismissed because neither met the requirements for a demotion hearing and because sovereign immunity barred their breach of contract and tort claims. Therefore, all of the claims were dismissed with prejudice.

The plaintiffs filed a motion to alter, amend or vacate the judgment, arguing that the ruling was inconsistent with the Supreme Court's opinion and that they were entitled to injunctive relief. Earl Martin McGuire, counsel for the plaintiffs, also filed a motion for attorney fees the same day. The Board of Education responded to both motions. On July 31, 2001, the circuit court entered an order taking the two motions

out of submission and ordered the parties to submit written and oral arguments on particular issues, including whether the violations of the open meetings act were willful and whether the plaintiffs were entitled to monetary damages other than those set out in the statute.

On October 11, 2001, the circuit court entered an opinion and order, in which it partially granted the plaintiffs' motion to alter, amend or vacate. After discussing the procedural history of the actions, the circuit court entered its well thought out conclusions of law as follows:

> The Court notes that this area is virtually uncharted territory of Kentucky law and this consolidated action seems to be the pioneer weathering through the dark forest of conflicting interests and little precedent to guide the way. The Supreme Court has clarified for us that the actions of the Board were indeed violations of the Open Meetings Act, but along this path that has been cleared, this case has again hit a crossroads with the issue of damages for such a violation.
>
> In considering the Plaintiffs' motion to alter, amend, or vacate this Court's previous Order, this Court centers on two primary issues for ultimate resolution. The first issue is whether the Plaintiffs, upon the finding that the Defendant Board of Education violated the Open Meetings Act, were entitled to an injunction reinstating them to their previously held positions, a part of which including [sic] back pay or other monetary awards reflective of the circumstances of each particular Plaintiff. The second and corollary issue of the first is if the first issue is found in favor of

the Plaintiffs, whether each Plaintiff is entitled to said monetary damages and what is the proper award recoverable.

The Supreme Court of the Commonwealth of Kentucky has answered the first question in the affirmative. As it stated in its opinion reversing this trial court:

> Finally, the request for injunctive relief was proper in this case. KRS 61.848, in pertinent part, states that where alleged violations of the Open Meetings Act occur, the circuit court shall have jurisdiction to enforce the provisions of KRS 61.805 to 61.850 as they pertain to the public agency "by injunction or other appropriate order on application by any person." Ratliff, Thompson, and Grigsby were not required to demonstrate that they had not [sic] adequate remedy at law in their request for an injunction. The Court of Appeals was correct in determining that the circuit judge erred by holding otherwise.

[Floyd County Board of Education v. Ratliff], 955 S.W.2d 921, 925 (Ky. 1997)(citations omitted). With such direction, it is clear that this Court must issue an injunction reinstating the Plaintiffs to their original positions. However, the Court did not specifically address the issue of whether or not the Plaintiffs were entitled to back pay from the date of their firing to the date of the injunction. However, from this Court's research on the issue from other jurisdictions, it is clear that in order to fully return the Plaintiffs to the position they originally held, back pay and other forms of monetary awards are necessary and proper.

The Texas Court of Appeals addressed a scenario that is similar to the facts before this Court. In the case of Ferris v. Texas Board of Chiropractic Examiners, 808 S.W.2d 514 (1991), the Plaintiff alleged a violation of the Texas Open Meetings Act. Plaintiff alleged that she was terminated during an illegal meeting and the facts further elicited that some time later, she was legally and properly fired from her position. The Plaintiff sought (1) declaratory judgment that the Defendant had violated the Open Meetings Act and (2) an injunction requiring the Defendant to reinstate her and award her back pay for the time that elapsed between the Board's initial illegal attempts to terminate her and the date on which she was legally terminated. The trial court in this case found a violation but refused to award an injunction, requiring the Defendant to reinstate her and award her back pay. The Plaintiff appealed to the Court of Appeals, which agreed with the Plaintiff's contention.

The Ferris court held that "the Board's attempts to terminate Ferris on July 9, 1998 and on February 25, 1989, at meetings admittedly held in violation of the Act, were void as a matter of law. Under [the Open Meetings Act], Ferris is entitled to have these unlawful actions reversed. Ferris therefore continued to be employed by the Board until the legal termination occurred on December 1, 1989." Ferris, 808 S.W.2d at 518. As a result of this holding, the Court ordered:

> We hold that because Ferris lawfully continued in the Board's employ as its executive director until December 1, 1989, she is entitled to receive all benefits and emoluments flowing from her employment; therefore the Board is

> enjoined from reflecting otherwise in her employment records; and further Ferris is entitled to receive the stipulated sum of $26,000.00 pay due her.

Id. at 519. This Court is persuaded by the holding and reasoning of the Ferris court. When a public agency violates the Open Meetings Act, any action taken during that meeting is declared illegal and is voidable by the Court. In other words, when a violation is found, the court can hold that the action was never taken and the aggrieved party be returned to his or her position as if the termination had never happened. A natural and flowing consequence of reinstating an employee as if he never left would be that the employee has not been paid during that time frame and therefore should recover what pay is due him.

With this Court's finding the logical and practical implications of the Ferris ruling to be applicable to the case at bar, the Court finds that the reasoning of the Ferris court shall apply to this case. However, the Court must next look to the individual facts and circumstances surrounding each Plaintiff's case to determine what amount, if any, each Plaintiff is entitled in the form of back pay or other monetary awards.

A. PLAINTIFF PETE GRIBSGY

As noted above, the Court, in its previous order of September 6, 2000, this Court [sic] held that Plaintiff Grigsby, having been reinstated to his former position and having settled his claim and executed a release and agreed order dismissing all claims, including claims arising out of the defendant's meetings in executive sessions during the months of March and April of 1993, his claims were

barred by the release and dismissal order previously entered.

In light of the current motion before the Court, the Court entertained argument from Plaintiff's counsel with regards to the issue of release and its effect on the 1993 action that is the subject matter of the above discussion. The Court, after reviewing the evidence as well as considering said arguments, finds that is previous decision barring Plaintiff Grigsby from further award in light of his settlement was sound and in accordance with the law. Plaintiff Grigsby executed a release wherein he released the Defendant that constituted "a full and final settlement of all claims including costs and attorney fees, all causes of action set forth in the Complaint except for the enforcement of this Settlement Agreement, and a Final Order to be entered in the above styled litigation." Even though it is argued that his release only covered the 1995 action, the Court is not so persuaded as to allow the Plaintiff to again recover in another action [] which deals with the same occurrences, i.e. the violation of the Open Meetings Act which was expressly set out as a cause of action in the 1995 complaint.

Therefore, with regards [sic] to Pete Grigsby, the September 6, 2000 order barring his claims because settlement and release stand and as such, Grigsby is not entitled to the aforementioned injunction and award of back pay. As noted in the September 2000 order, Plaintiff Grigsby's claim is dismissed with prejudice.

B. PLAINTIFF WAYNE RATLIFF

At the time of the illegal meeting, Plaintiff Ratliff was employed as the Co-Food Service Director for the Floyd County School District. After his position was

terminated in this capacity, Ratliff was reassigned to a teaching position for the 1993-94 school year, but prior to the beginning of the school year, Plaintiff voluntarily retired by letter dated April 5, 1993. His retirement was finalized in July of 1993 and [he] has been receiving full time benefits from the Kentucky Teachers' Retirement System since that time.

Having had his position terminated in contravention of the Kentucky Open Meetings Act, Plaintiff Ratliff is entitled to an injunction returning him to his previous position as if he had never been fired. However, the remaining issue before the Court is the effect of his retirement upon the injunction and the amount to which he is entitled in the form of back pay.

The Court finds that, in order to return the Plaintiff to his original position as if the termination had never occurred, Plaintiff Ratliff shall be entitled to his back pay from the date of the termination until the date of his retirement in July of 1993. This is done so following the persuasive reasoning of the Ferris court.

Further, the Court finds that it is clear from the evidence that Plaintiff Ratliff would not have voluntarily retired but for having lost his position as food service director. Therefore, while the Court cannot order the Plaintiff out of retirement and to continue to work until the age of retirement, the Court finds that the Plaintiff should recover the difference in the amount of his retirement as of the date of his retirement in July of 1993, that he is currently receiving, and the amount his retirement would have been if he had stayed in his position until the commonly accepted age of retirement of 65.

The Court finds this to be the most adequate way of returning Plaintiff Ratliff to the position he was in prior to the illegal meeting during which he was terminated.

C. PLAINTIFF TOMMY THOMPSON

Plaintiff Thompson's case is comparable to that of Plaintiff Ratliff's. Under the principles espoused above, Plaintiff Thompson is entitled to be reinstated to his previous position as he held prior to the illegal termination. However, Plaintiff Thompson was later re-employed as a principal in the Lawrence County School District. Therefore, as with Plaintiff Ratliff, Plaintiff Thompson should receive his back pay from the date of his illegal termination to the date when he obtained other employment. Thereafter, as it is clear that Plaintiff Thompson would not have obtained other employment if it were not for the illegal termination, Plaintiff Thompson should receive the difference in the amounts of pay between his position in Floyd County and his subsequent position in Lawrence County. Thompson shall be entitled to this difference, if there is any at all, up to the time when his pay at Lawrence County is the same as it was in Floyd County. The Court sets this as the cut-off point for compensation to the Plaintiff as if it were to continue beyond this time, the Plaintiff would be receiving a windfall and in effect would be paid for two jobs.

The Court's intent in resolving this dispute is to bring all the parties involved in the position they would have been if the meeting had never taken place. The Court finds that the manner in which it has done so furthers that intent in the most equitable way possible with such heated conflicting interests brought to bear in this case.

> WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs' motion to alter, amend or vacate the order of September 6, 2000 to be, and the same is, SUSTAINED to the extent that is reflective of the above discussion. The Court does not purport to alter its previous decision with regards to the issues contained in the Plaintiffs' 1995 actions or with regards to the issue of the $100.00 per occurrence penalty, costs, and attorney fee award, and the Order remains unaltered in that respect and to the extent that the Plaintiffs move the Court to do so, their motion is overruled.
>
> The remaining issue before this Court with regard to these cases is the amount of damages entitled to Plaintiff Ratliff and Plaintiff Thompson as a result of the Court's findings above. The Court is without sufficient information to arrive at the exact figures to be awarded and therefore, a hearing, with only the above issue to be discussed and heard before this Court, is scheduled to be heard in the Johnson Circuit Courtroom on October 29, 2001 at the hour of 10:00 a.m.

Upon the plaintiffs' motion to clarify, the circuit court entered an order on November 5, 2001, indicating that the October 11, 2001, order and opinion was interlocutory in nature. The hearing on damages was eventually heard on November 16, 2001, although the transcript of this hearing was apparently never requested, as one does not appear in the certified record.

On February 12, 2002, the circuit court entered an Order and Final Judgment, incorporating its previous order of October 11, 2001. To Thompson, the circuit court awarded the amount of $158,925.61, representing his full salary prior to

leaving the Board's employment for the 1993-94 school year when he was unemployed and for the difference between his prior salary and his current salary from the 1994-95 through the 2003-2004 school years, along with a supplemental amount of $709.59. To Ratliff, the circuit court awarded the amount of $186,583.04, representing four months of salary until his retirement and the diminution in value of his monthly retirement income. The circuit court also ordered the Board to reinstate Thompson and Ratliff to their former positions for the limited purpose of reimbursing them for the amounts the Board was ordered to pay.

On February 22, 2002, the plaintiffs filed a motion to alter, amend or vacate or for clarification, arguing that they were entitled to reinstatement, that it was error to deny them damages from the 1995 actions, that the circuit court should have awarded interest, that the circuit did not address the individual liability of the defendants, and that the violations of the Open Meetings Act were intentional so that attorney fees should have been awarded. By order entered August 21, 2002, the circuit court denied the plaintiffs' motion to alter, amend or vacate, reasoning that they were not entitled to file a second motion to alter, amend or vacate in reliance on Cloverleaf Dairy

v. Michels.[9] The appeal by the Board of Education and the cross-appeal by the plaintiffs and their counsel followed.

On appeal, the Board of Education presents two arguments. In the first, the Board of Education argues that it ratified its previous open meetings act violations, so that the plaintiffs were not entitled to any recovery. The second argument is based upon the effect the Board of Education's correction of the violations would have on any damages awarded. In their responsive brief, the Ratliff, Thompson and Grigsby first argue that the Board of Education's appeal should be dismissed due to counsel's use of a brief tendered by, and returned to, an attorney who was disqualified by a three-judge panel of this Court. As to the merits of the Board of Education's appeal, Ratliff, Thompson and Grigsby argue that the Board could not correct the violations and that the damages argument was improper, as it was never raised before the trial court.

On cross-appeal, Ratliff, Thompson, Grigsby and McGuire argue that the trial court erred in failing to reinstate the restraining order, in not finding that the open meetings act violations were willful so that attorney fees and costs could be awarded, and in failing to award the full measure of damages. In its responsive brief, the Board of Education did little more

[9] Ky.App., 636 S.W.2d 894 (1982).

than repeat the arguments it made in its original brief, although it did respond to the motion to dismiss and to the attorney fee argument.

We shall first address the motion to strike the Board of Education's brief and dismiss the direct appeal. For purposes of appeal, the Board of Education retained Patricia Bausch of the firm Sturgill, Turner, Barker & Maloney to represent its interests. As appellate counsel, she tendered a brief on behalf of the Board of Education. Prior to the filing of the brief, Ratliff, Grigsby, Thompson and McGuire filed a motion to disqualify attorney Bausch and her firm from representing the Board of Education. In support of their motion, they argued that Tammy Meade, a current member of attorney Bausch's law firm, was formerly an assistant counsel for them in the underlying action and assisted in the preparation and prosecution of their case. They asserted that attorney Meade was aware of significant issues, and of both trial and appellate strategy for this case. In particular:

> Patricia Bausch admits that Ms. Meade "covered a deposition or two for Mr. McGuire" in this action, and "made an appearance at motion hour" on behalf of [appellees/cross-appellants]. Ms. Meade also researched and briefed issues in the case, sat in on client conferences with the [appellees/cross-appellants], held meetings in person and via telephone with the [appellees/cross-appellants], drew up legal strategy and plans for prosecution of the

> case, assisted in preparation of documents to be used on appeal of the action, met with present counsel for [appellees/cross-appellants] in person and via telephone conferences to discuss the case and possible ideas for appeal of the case, and organized the file for trial. Lastly, Ms. Meade was present during hearings, court appearances and motion hours prior to trial of the action.

A three-judge motion panel of this Court granted the motion to disqualify attorney Bausch and her firm as counsel for the Board of Education, noting that attorney Meade's involvement "was more than 'brief and perfunctory,'[] which creates a presumption that Meade became privy to confidential information and strategy pertaining to the case,[] and which would now disqualify her were she the attorney selected to practice it for appellants/cross-appellees." In disqualifying appellate counsel, this Court recognized that the Board of Education would not be left without counsel as trial counsel, Michael Schmitt, had filed an identical appeal, which was dismissed as a duplicate appeal by the same order. As a result of the disqualification, the Court ordered the clerk to return the brief tendered by attorney Bausch and allowed attorney Schmitt twenty days to tender an amended brief. Pursuant to this order, attorney Schmitt tendered an amended brief, which was eventually filed on April 24, 2003.

In their brief to this Court, Ratliff, Grigsby, Thompson and McGuire included a "renewed motion to dismiss," which this Court has treated as a motion to strike the Board of Education's brief and dismiss the direct appeal. The motion asserts that the brief filed by attorney Schmitt incorporated numerous pages of the previously returned brief, including "lengthy verbatim portions of the earlier brief . . ., including virtually all of the 'Argument' section.". In doing so, they argued that the Board of Education perpetuated the conflict of interest this Court had previously found. In the responsive brief, the Board of Education stated, as it did in its response to the motion to disqualify, that attorney Meade had been secluded from Sturgill, Turner, Barker & Maloney's representation in this case and that there was no demonstration that confidential matters known to attorney Meade were contained in the argument section of its brief. The Board of Education concluded with the following statements:

> It is properly stated that after dismissal of the brief prepared by disqualified counsel, co-counsel did prepare a "new" brief for Floyd County, incorporating numerous pages of the dismissed brief. . . . Where proper arguments of law are presented, there is no need to recreate the wheel. State law is state law and the trial record speaks for itself.

We agree with Ratliff, Grigsby, Thompson and McGuire that the Board of Education's brief must be stricken. Although

this ruling might appear harsh, this Court had a valid reason to disqualify appellate counsel on the basis of conflict of interest. It is disingenuous for counsel for the Board of Education to argue that a "new" brief was filed, when counsel admitted that it contained "numerous pages" of the prior brief. If the first brief, as drafted by a disqualified attorney, had to be returned because of the conflict, there is no reason that a brief containing identical pages, albeit signed by a different attorney, could ever be acceptable. Because we are striking the brief, the Board of Education's direct appeal is unperfected, and must therefore be dismissed.

Even if we were to address the merits of the direct appeal, we would affirm. We disagree with the assertion that the Board of Education corrected the open meetings act violation in a subsequent meeting. Furthermore, the Board of Education failed to preserve its damages argument before the circuit court.

In the cross-appeal, the significant issues are the amount of damages awarded, the failure to reinstate the restraining order, the circuit court's finding that the Board of Education's violations of the Open Meetings Act were not willful, and the ensuing denial of attorney fees. We must affirm on the damages argument because we do not have a transcript of the November 16, 2001, hearing on the issue of

damages. Therefore, we shall assume that the missing portion of the record supports the circuit court's findings and ultimate decision. Furthermore, it appears that Ratliff and Thompson were fairly compensated, and we agree with the circuit court that Grigsby's earlier settlement encompassed all of his claims.

On the issue of injunctive relief, we also affirm. We agree that Ratliff, Grigsby, and Thompson were entitled to injunctive relief. The Supreme Court of Kentucky held that injunctive relief was proper.[10] Upon remand, the circuit court cited to this opinion and stated, "[w]ith such direction, it is clear that this Court must issue an injunction reinstating the Plaintiffs to their original positions." (Opinion and Order entered October 11, 2001, p. 7.) Later in the opinion, the circuit court stated that Ratliff and Thompson were both entitled to be reinstated to their respective previous positions. In its Order and Final Judgment, the circuit court ordered Ratliff and Thompson to be reinstated to their former positions for the limited purpose of reimbursing them the money awarded. Although the circuit court did not specifically enter a permanent injunction, as it did in the previously set aside order, injunctive relief was nevertheless afforded to Ratliff and Thompson in that they were for a short time reinstated to their former positions in order for them to receive their

[10] Floyd County Board of Education v. Ratliff, 955 S.W.2d at 925.

damages. Furthermore, pursuant to the terms of his settlement agreement, Grigsby was reinstated to his former position as Assistant Superintendent of Floyd County Schools. There is nothing that the Board of Education could do at this point to enforce their previous actions or retaliate against these individuals.

Next, we shall address the circuit court's finding that the Board of Education's violations were not willful. KRS 61.848(6) provides that "[a]ny person who prevails against any agency in any action in the courts regarding a violation of KRS 61.805 to 61.850, where the violation is found to be willful, may be awarded costs, including reasonable attorneys' fees, incurred in connection with the legal action." In its September 7, 2000, judgment, the circuit court based its finding that the violations were not willful on the Supreme Court of Kentucky's original opinion, in which it was noted that there were no Kentucky cases or statutes regarding the "pending litigation" exception, as well as on the facts surrounding the meetings in question. The circuit court also heavily relied upon the dissenting opinion of Chief Justice Stephens. These circumstances and the Supreme Court's opinion led the circuit court to find that the violations were "the result of an honest mistake as to the application of the Open Meetings Act to the subject matter under discussion." At the outset, we note that

Ratliff, Grigsby, Thompson and McGuire's reliance upon the circuit court's finding of willfulness in its February 2, 1998, order is not well taken. That particular order was set aside by an order entered several months later. Furthermore, they failed to cite to where in the record evidence appeared about the Board of Education's knowledge of the illegality of its meeting. Despite this, we agree with Ratliff, Grigsby, Thompson and McGuire that substantial evidence does not support the circuit court's finding of a lack of willfulness.

The circuit court relied upon the earlier decision of the Supreme Court of Kentucky, which indicated that there were no Kentucky cases or statues on this issue, as well as the dissenting opinion to support its finding. However, a full reading of this portion of the decision reveals something altogether different:

> The General Assembly has clearly stated its legislative intent in regard to closed, executive or secret meetings. It is set forth in KRS 61.800:
>
> > The General Assembly finds and declares that the basic policy of KRS 61.805 to 61.850 is that the formation of public policy is public business and shall not be conducted in secret and the exceptions provided for KRS 61.810 or otherwise provided for by law shall be strictly construed.
>
> Consequently, the courts of the Commonwealth must narrowly construe and

apply the exceptions so as to avoid improper or unauthorized closed, executive or secret meetings.

There are no specific Kentucky cases or statues relating to the scope of the "pending litigation" exception which is found in KRS 61.810(1)(c). We agree with the Court of Appeals that the drafters of this legislation clearly envisioned that this exception would apply to matters commonly inherent to litigation, such as preparation, strategy or tactics. Obviously, anything that would include the attorney-client relationships would also fall within this exception. The statute expressly provides that the litigation in question need not be currently pending and may be merely threatened. However, the exception should not be construed to apply "any time the public agency has its attorney present" or where the possibility of litigation is still remote.[11] As properly noted in Jefferson County Board of Education, supra, the matters discussed under KRS 61.810(1)(c) must not be expanded to include general discussions of "everything tangential to the topic."

A careful review of the circumstances and record indicates that the Board went into executive session to consider the reorganization plan and not pending litigation. The discussion expanded the intended scope of the litigation exception and improperly concealed matters otherwise appropriate to the view of the public. The argument by the Board that everyone knew that the Board was forced into executive session by threatened litigation is contradictory to the clear statement of the minutes which identifies only "personnel" as the specific reason for going into secret session. The depositions of several of the members of the Board indicate that they

[11] See Jefferson County Board of Education v. The Courier-Journal, Ky.App., 551 S.W.2d 25 (1977).

talked about general reorganization and restructuring of the central administrative office, but none of the depositions indicated that the reason for the closed meetings was to deal with proposed or pending litigation. (Emphasis added.)

The personnel exemption to the Open Meetings Act does not allow a general discussion concerning a school reorganization plan when it involves multiple employees.[12] Reed v. City of Richmond[13] held that a closed meeting discussion of matters affecting more than one employee, even if the facts of each case were the same, is improper. Here, the Board argues that there was substantial compliance with the law because of the so-called veiled threats of potential litigation which justified the secret meeting, and that there was some kind of substantial compliance with the exception. We cannot agree. As noted earlier, the exceptions provided by KRS 61.810 must be strictly construed.

KRS 61.815 provides that prior to going into an executive session, the public body must state the specific exception contained in the statute which is relied upon in order to permit a secret session. There must be specific and complete notification in the open meting of any and all topics which are to be discussed during the closed meeting. In this case, the minutes of the Board do not reflect any mention of the "proposed or pending litigation" exception to the Open Meetings Act. The specific reason given for a closed session must be the only topic of discussion while the Board convenes in such a secret session.[14]

We agree with the language written by then Court of Appeals Judge Johnstone and

[12] KRS 61.810(1)(f).
[13] Ky.App., 582 S.W.2d 651 (1979).
[14] See Fiscal Court v. Courier Journal and Louisville Times Co., Ky., 554 S.W.2d 72 (1977); Jefferson County Board of Education, supra, at 28.

> concurred in by the panel composed of Judges Schroder and Wilhoit that "the exceptions to the open meetings laws are not to be used to shield the agency from unwanted or unpleasant public input, inference or scrutiny. Unfortunately, we believe that is precisely how they were used in this case." (Emphasis added.)[15]

Based upon our complete reading of the prior decision, we cannot hold that there is substantial evidence to support the circuit court's finding that the violations were not willful, but were "the result of an honest mistake as to the application of the Open Meeting Act." Rather, the record is clear that the Board members willfully violated the Open Meetings Act to shield themselves from the public. The Board of Education indicated that it was going into executive session to discuss "personnel", but then blamed the threat of litigation as the root of the session. However, even if the purpose had been to discuss "personnel", the Board of Education was not permitted, by statute, to discuss the reorganization because it involved more than one person. For these reasons, we reverse the circuit court's ruling and hold that the Board of Education's violations of the Open Meetings Act were willful. In so holding, we are not stepping into the shoes of the fact finder, but are merely applying the law to the facts of this case.

[15] Floyd County Board of Education v. Ratliff, 955 S.W.2d at 923-24.

We shall next address the circuit court's denial of the motion to award attorney fees. KRS 61.848(6) provides for the award of costs, including reasonable attorney fees, for a willful violation of the Open Meetings Act. Because we have determined that the Board of Education's violations were willful, we must reverse the circuit court's ruling and remand this matter for a determination as to whether the plaintiffs are entitled to an award of attorney fees in light of the Board of Education's willful violation of the act.

For the foregoing reasons, the motion to strike is hereby GRANTED, the brief filed by the Board of Education on April 24, 2003, is ORDERED STRICKEN and as a result, appeal No. 2002-CA-001971-MR is ORDERED DISMISSED. Cross-appeal No. 2002-CA-001968-MR is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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